

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Communications Assistance for Law
Enforcement Act

CC Docket No. 97-213

PETITION FOR RECONSIDERATION

The Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI") file this petition for reconsideration of the Order of the Office of Engineering and Technology ("OET") released in this proceeding on March 2, 1999. That Order grants the requests of five telecommunications equipment manufacturers for confidential treatment of cost data submitted in this rulemaking proceeding (Order ¶¶ 1, 4). It states that the Office of Engineering and Technology will "aggregate the [manufacturers'] data, if possible, in a manner that does not reveal the confidential information," release the aggregated data to the public, and use those data as a basis for decisionmaking by the agency. Order ¶ 6.

DOJ/FBI seeks reconsideration because OET's Order is an unwarranted departure from the Commission's announced policy discouraging the use of confidential information in rulemaking proceedings. The Order attempts to accommodate the concerns underlying the Commission's general confidentiality policy by providing for the release and use of aggregated cost data, but the aggregated data cannot provide a proper basis for Commission decisionmaking if the public — and

the Commission itself — are denied access to the information and assumptions that underlie those data. The Order therefore should be either withdrawn or modified to make more meaningful comment possible.

1. The Commission has explicitly stated that it ordinarily will refuse to consider confidential materials in rulemaking proceedings because "rulemakings have a broad impact on the public, and wide public participation, with a full opportunity to comment, is contemplated by the A[dministrative] P[rocedure] A[ct]." Treatment of Confidential Information Submitted to the Commission, GC Docket No. 96-55, Report and Order, FCC 98-184, ¶ 44 (released August 4, 1998) ("Confidentiality Report"). In formulating its policy, the Commission explained that a grant of confidentiality may threaten the fairness of a rulemaking process because "[a]n agency's decision to withhold information in the context of a rulemaking can have a significant impact on whether commenters have had meaningful notice and opportunity to comment on the bases of an agency's decision." *Ibid.* The Commission observed in particular that the parties to a rulemaking must be given "a full opportunity to participate in the proceeding by providing a different perspective on materials that may be relied upon by the agency." *Ibid.* (footnote omitted).

In those rare instances in which confidential information is "highly relevant" to an "ultimate decision[]", the Commission has proposed a specific mechanism to protect the integrity of the administrative process: the Commission will "consider requests for confidential treatment that propose to limit the availability of confidential information in rulemaking proceedings to those who have executed a protective order." Confidentiality Report ¶ 45. The Commission also has made clear that "if the request for confidentiality is denied, as we expect it would be in most cases," then

confidential materials should ordinarily be returned under 47 C.F.R. § 0.459(e) to the party that submitted them.

2. OET's Order departs from the policies and procedures that the Commission has established for the use of confidential information in rulemaking proceedings. Not only does the Order grant confidential status to information in a public rulemaking, but it does so without providing other interested parties even limited access to that information pursuant to a protective order.

Nothing about this proceeding warrants this departure from the Commission's general confidentiality policy. See generally Confidentiality Report ¶ 44. Indeed, OET's treatment of the manufacturer cost information is particularly unwarranted in light of the limited role assigned to cost considerations under Section 107(b) of CALEA. The purpose of this rulemaking under Section 107 is to identify the specific communications assistance capabilities that CALEA requires and to correct deficiencies in the industry standard that would otherwise provide a "safe harbor" under § 107(a)(2). Congress has made clear that cost considerations are not central to this task, and thus there is no compelling need to accede to the manufacturers' request for confidentiality.

With respect to the capabilities required under Section 103 of CALEA, Congress itself has determined that the benefits of industry compliance with the requirements exceed the costs, and § 107(b) is not intended to permit administrative second-guessing of that cost-benefit determination. See DOJ/FBI December 14 Comments at 8-15; DOJ/FBI January 27 Reply Comments at 8-18. Congress did not ignore the question of costs in relation to compliance with required assistance capabilities, but it addressed that question by providing a specific avenue of relief for individual

carriers if compliance is not "reasonably achievable," and by making cost a factor for the Commission to consider in the determination of reasonable achievability. 47 U.S.C. § 1008(b) (Section 109(b) of CALEA).¹

By contrast, Congress made clear that cost considerations bear only incidentally upon the Commission's primary task under Section 107 of delineating the scope of carrier assistance capability obligations. The Commission's standards must "meet the assistance capability requirements of section 103 by cost-effective methods" (47 U.S.C. § 1006(b)(1)) and must "minimize the cost of such compliance on residential ratepayers" (*id.* § 1006(b)(3)) (emphasis added). Thus, although the Commission must take account of cost in determining how the assistance capability requirements of Section 103 are to be met, it cannot use cost considerations to excuse carriers from "meet[ing] the assistance capability requirements" in the first instance. See generally DOJ/FBI December 14 Comments at 8-15; DOJ/FBI January 27 Reply Comments at 8-18. Because cost considerations are not relevant in determining the scope of CALEA's assistance capability requirements, the submission of confidential cost information in this proceeding cannot justify OET's departure from the Commission's policy on confidentiality.

If cost were a primary consideration under Section 107(b) — which it is not — then entertaining the submission of confidential cost information would be even less warranted.

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In determining whether CALEA compliance is "reasonably achievable" for a particular carrier, the Commission is directed by Section 109(b) to consider, inter alia, whether "compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's systems" (47 U.S.C. § 1008(b)(1)), taking into consideration "[t]he effect on the nature and cost of the equipment, facility, or service at issue" (*id.* § 1008(b)(1)(E)), and "[t]he financial resources of the telecommunications carrier" (*id.* § 1008(b)(1)(H)).

Confidential information is always insulated, at least to some extent, from meaningful challenge. Any final decision of the Commission that is substantially based on such information therefore lacks the full benefit of informed public comment, as the Commission has recognized. See Confidentiality Report ¶ 44 (stating that if a party “has information that will significantly affect the decision on a proposed rule * * *” then “other interested parties may not be deprived of the opportunity to challenge it”) (emphasis added). Thus, if the Commission were inclined to accept industry’s view that cost considerations play a significant role in this rulemaking proceeding, then it would be all the more important for the Commission to afford DOJ/FBI and other commenters a meaningful opportunity to provide their “different perspective” upon the manufacturers’ cost information. Confidentiality Report ¶ 44.

3. OET's Order tries to balance the concerns regarding confidentiality in rulemaking by providing for the disclosure of aggregated data and by limiting the Commission to consideration of the aggregated numbers. See Order ¶ 5. OET's solution, however, creates as many problems as it purports to solve.

Cost data from the telecommunications manufacturers can be understood only in light of the assumptions and industry conventions that frame them. Without access to the specific underlying data, neither commenters nor the Commission itself can fully understand the context in which these data are presented, or assess their real significance. The price of aggregating the cost data is therefore the integrity and usefulness of the cost information itself.

For example, in evaluating the manufacturers' cost data, the Commission must test the accuracy of numerous assumptions and ensure that the proper principles were applied, including the following: (1) that cost data relate not to the total cost of meeting CALEA's assistance capability

requirements but to the incremental cost of implementing the "punch list" capabilities that are at issue in this proceeding; (2) that cost estimates are based upon explicit and reasonable assumptions about key variables such as anticipated price discounts; (3) that manufacturers have properly identified the costs associated with individual capabilities; (4) that manufacturers have made reasonable attempts to identify any less expensive alternatives for correcting the deficiencies at which particular punchlist items are directed; (5) that manufacturers attribute to CALEA only that portion of the development and deployment costs of regular upgrades that represents the addition of the CALEA features; and (6) that the manufacturers' cost estimates accurately reflect the number and types of switches for which carriers will have to provide CALEA solutions. The Commission cannot be sure of either the meaning or the validity of the cost data unless some mechanism is in place for identifying and evaluating underlying assumptions of this type.

Because unitary costs and prices are calculated from a number of underlying premises, any meaningful analysis of the manufacturers' cost data requires that commenters and the Commission have access to cost data in its non-aggregated form. OET's Order forecloses the release of non-aggregated data, and it states that the Commission itself will "consider only the aggregated data and not the individual data provided by the manufacturers." Order ¶ 5. The Order thus fails to protect the right of the Commission, DOJ/FBI and other interested parties to effectively evaluate information submitted in this public rulemaking.

4. For the foregoing reasons, DOJ/FBI requests that the confidentiality requests be denied on reconsideration and that the cost data be returned to the manufacturers in accordance with 47 C.F.R. § 0.459(e). If DOJ/FBI's request is rejected, at a minimum the Order should be modified

so that DOJ/FBI and other interested parties can respond as meaningfully as possible to the confidential cost information. We suggest three ways in which the Order could be modified toward that end.

First, consistently with the Commission's general policy on the use of confidential materials in rulemakings, DOJ/FBI would be willing to execute an appropriate protective order to safeguard the confidentiality of the manufacturers' cost data. See *id.* ¶¶ 21-32 and Model Protective Order. Under an appropriate protective order, DOJ/FBI could assist the Commission in evaluating the manufacturers' cost data, and it should be accorded the opportunity to do so.

Second, the Commission could take steps to ensure that DOJ/FBI has a reasonable opportunity to present its own cost information to the Commission. A number of manufacturers have given the FBI proposed prices for CALEA solutions (as distinct from underlying manufacturer costs). These price proposals, however, have been made pursuant to non-disclosure agreements that prohibit the FBI from disclosing proprietary information, including price information, without the manufacturers' consent. The nondisclosure agreements with the manufacturers have limited DOJ/FBI's ability to respond to the Commission's inquiries with regard to cost.

As the situation now stands, manufacturers have submitted cost-related data to both the Commission and the FBI in a manner that prevents the Commission and the FBI from having access to a pool of common information. In seeking accurate estimates of cost, the Commission would benefit from the opportunity to compare the manufacturers' two CALEA-related cost submissions and to seek clarification with regard to any discrepancies that might be revealed. Moreover, DOJ/FBI deserves the opportunity to test the validity of the manufacturer's assumptions, to evaluate their methods of calculating cost, and to share the results of its analysis with the Commission.

OET's Order should therefore be modified with regard to those manufacturers who have entered into nondisclosure agreements with the FBI. Specifically, the Commission should grant confidential treatment to such manufacturers only on condition that the manufacturers release the FBI from pertinent nondisclosure agreements, at least to the extent necessary for DOJ/FBI to submit its own cost information to the Commission.

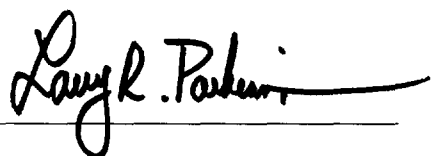
Third, the Commission should publicly disclose the assumptions that form the basis of the manufacturers' analyses of cost. If cost data are to be useful to the Commission, then the Commission must understand what they represent. The Commission should therefore release for comment important non-confidential information about basic assumptions, such as the number and type of switches covered, estimated phase-in requirements, and discounts to be offered on price. The Commission should also disclose what proportion of the costs of inevitable upgrades manufacturers are imputing to CALEA, and, more specifically, to particular punchlist items.

The disclosure of information of this type would not violate manufacturers' interest in the privacy of their proprietary information. Nonetheless, the information is crucial to the other commenters and to the Commission itself. Cost data based upon erroneous or even questionable assumptions would be of little assistance to the Commission.

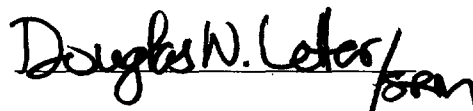
5. As it stands, OET's Order represents an unjustified departure from the balance that the Commission has struck between protecting both the confidentiality of sensitive information and the integrity of the administrative process in the context of public rulemakings. See generally Confidentiality Report ¶¶ 43-46. Upon reconsideration, the Order should be vacated and the Commission should fashion relief that better serves its general policy.

DATE: March 30, 1999

Respectfully submitted,

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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Enforcement Act :)
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Certificate of Service

I, David Yarbrough, a Supervisory Special Agent in the office of the Federal Bureau of Investigation (FBI), Washington, D.C., hereby certify that, on March 31, 1999, I caused to be served, by first-class mail, postage prepaid (or by hand where noted) copies of the above-referenced Petition for Reconsideration, the original of which is filed herewith and upon the parties identified on the attached service list.

DATED at Washington, D.C. this 31st day of March, 1999.

David Yarbrough
David Yarbrough

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